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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-521

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR,

Petitioner,

v.

DELTA MINING, INC.
G. M. W. COAL COMPANY
EDWARD MEARS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS, Delta Mining, Inc. and G.M.W. Coal Company IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE CASE IS MOOT

The controversy in this case concerns a body of civil penalty regulations which are no longer in effect. Published on January 17, 1971 as 30 C.F.R. Part 100, to implement the civil penalty provisions of the Federal

Coal Mine Health and Safety Act of 1969, such regulations were replaced by a new set of civil penalty regulations in April 1973. Shortly afterwards, on May 25, 1973, the District Court, Pittsburgh, Pennsylvania, granted the Respondents' Motion for Summary Judgment on the grounds that such regulations failed to conform with the Act which they were published to implement. Subsequently, the Third Circuit Court of Appeals affirmed the judgment of the District Court. The controverted regulations had thus ceased to be effective even before the district court decision in this case was rendered, as well as before the Third Circuit decision was rendered; consequently, the issues which the Petitioner seeks to raise about the regulations are moot.

The Petitioner concedes that the regulations in this case are no longer in effect; however, in point 1, page 13 of Petitioner's Brief, it is stated that "the decision below, if unreversed, will significantly interfere with the effective enforcement of the Federal Coal Mine Health and Safety Act." The Petitioner thus takes the position that, for the purpose of having the Third Circuit decision reviewed by this Court, the fiction should be indulged that the regulations have some kind of post-mortem substantive significance. The ultimate purpose of this fiction is to help the Interior Department to decide what to do with pending court cases which involve penalties assessed under the former regulations, and which are now enshrouded in doubt because of the split between the Third Circuit, which found the former regulations to to be invalid, and the District of Columbia Circuit, which found contra.[1] Although the Petitioner offers argument

[1] The Petitioner states that the cases filed or ready for filing in the district courts number more than 2,400 separate actions, involving an estimated 24,000 alleged violations. However, except [footnote continued]

in support of this position (pps. 13-17, Petitioners Brief), by attempting to portray the Interior Department's enforcement of the Mine Safety Act as hopelessly stultified by the doubts, uncertainty, and general adversity, resulting from the Third Circuit case, the argument really tells us nothing more than that the Department is faced with a few run-of-the-mill problems that are typical of the agency part of the government process. The argument is also unsound and misleading in several respects. It reveals, for example, that the Petitioner could have long ago dealt with the pending court cases simply by reassessing them under the new regulations. Yet, this obvious and practical course of action has not been taken because the Petitioner anticipates a legal challenge to the new regulations, which challenge, if successful, would render the reassessment work on the pending cases all in vain. The Petitioner fails to mention, however, that the same successful challenge to the new regulations would also render useless all assessment work performed under the new regulations since April 1973. Since this post-April 1973 work, according to the Petitioner, involves the assessment of 80,000 violations annually, it becomes quite clear that the pending court cases would be but a minor consideration indeed in the event that all such work were rendered useless because the new regulations succumb to legal challenge. Respondents submit, therefore, that the Petitioner's speculations about the possible illegality of the new regulations not only fails to justify his refusal to reassess the pending court cases under such regulations,

for the 150 cases presently pending in the Third Circuit, the Petitioner does not state how many cases have been actually filed in district courts. Thus, the elastic term "ready for filing" could well refer to a large number of violations which are contained in the files of the Justice Department, but which are not yet encompassed in a docketed case.

but also fails to demonstrate any reason why this Court should review the Third Circuit case.

Respondents further submit that there is an even more decisive reason to reject the Petitioner's entire argument insofar as it relates to the new regulations. The new regulations are in no way involved in the decision of the Third Circuit or in the decision of the District of Columbia Circuit. It is true that the Petitioner has made numerous references to the new regulations in the course of this litigation, primarily to speak about their legal adequacy in contrast to the comments here about their possible illegality; however, the most cursory reading of the Circuit Court decisions will conclusively demonstrate that the new regulations are not even indirectly involved in those decisions. It therefore follows that the Petitioner's argument about the invalidation of the new regulations, by some future litigation, cannot be said to have any bearing on the decision in the Third Circuit case.

The Petitioner's great emphasis on the "staggering task" entailed by the reassessment of the pending court cases (involving 24,000 alleged violations) appears to be a case of the right hand not knowing what the left hand has been doing. The Interior Department has already reassessed approximately 36,000 violations originally assessed under the former regulations.[2] The task merely involved

[2] On December 31, 1974, the Assessment Office of the Interior Department advised that 36,000 violations previously assessed under the former regulations were reassessed under the new regulations during the period May 1973 to July 1, 1974. The Office also advised that it is almost current on assessment of new violations, which is substantially contrary to the Petitioner's reference to the Department's assessment program as "already suffering from unacceptable delays and backlogs." (pgs. 15 & 16 of Petitioner's Brief)

the assignment of particular personnel to reassessment work while other personnel worked on new assessments. Moreover, since these reassessments were completed by July 1, 1974, and since they were made at a rate which would enable the court cases to be covered in a little more than seven months, one might well ask why the court cases were not put in the reassessment process when the 36,000 violations were completed. Had that been done, the task of reassessing the court cases would now be only a month or two away from completion. In any event, in view of what the Department has already done in the way of reassessment work, it seems far from accurate to refer to the reassessment of the court cases as a staggering task.

The Petitioner's point about voluntary settlements is also unsound. No one would question the importance and desirability of making voluntary settlements of penalty liability. However, Respondents do question the Petitioner's conclusion that such settlements have been adversely affected by the decision of the Third Circuit and the District of Columbia Circuit. We note that the Petitioner offers no information to show that more settlements were effected before this litigation commenced than were effected after it commenced. Nor does the Petitioner demonstrate how one can know that an operator's unwillingness to settle is attributable to the uncertainty created by the Third Circuit ruling, rather than to the facts, monetary impact, personalities, and other such circumstances involved in his particular case. We submit therefore that the Petitioner's point about voluntary settlements leaps too far, particularly since a large part of the reason why this litigation was undertaken by the Respondents is that appropriate voluntary settlements could not be worked out with the Interior Department's

Assessment Office. This condition changed, however, shortly after the decision of the judgment of the district court in this case and it is now almost routine for the Respondents to make voluntary settlements of civil penalties under the new regulations. And while the Respondents do not have access to the vast amount of data which is available to the Petitioner, the information that we do have strongly indicates that other operators, who could not effect settlements prior to this litigation, are now arriving at satisfactory settlements of civil penalties under the new regulations.

There are other flaws in the Petitioner's contention (point 1, page 13 of Petitioner's Brief) that regulations no longer in use have some continuing impact on the enforcement of the Mine Safety Act; however, Respondent submits that the foregoing adequately shows that the regulations involved in this case were replaced in April 1973 and that the issues concerning such regulations are therefore moot in the fullest sense of the term. Indeed, in view of the large number of violations being assessed under the new regulations (80,000 annually), one might well ask whether reversal of the Third Circuit decision would help or hinder the Petitioner in putting his assessment house in order. Suppose that the former regulations are validated. What would the Petitioner do about penalties which have been assessed under the new regulations? Would the Petitioner reassess such penalties under the newly validated former regulations? Or would the Petitioner turn again to the courts to obtain relief from a staggering task?

THE DECISION OF THE THIRD CIRCUIT IS CORRECT

The decision of the Third Circuit Court of Appeals has correctly resolved all of the issues concerning the former regulations. After a careful review of the controlling statutory language, its legislative history as interpreted by the Petitioner, the texts of the former regulations, and the Interior Department's assessment actions thereunder, the Third Circuit issued a simple, straightforward ruling that the plain import of the statutory terms must be followed in assessing civil penalties against mine operators and miners under the Coal Act. In making this ruling, the Third Circuit had the full benefit of the opinion of the contra decision rendered by the District of Columbia Circuit Court of Appeals.[3]

The opinion of the Third Circuit noted that the narrow question before it was whether the Interior Department's Civil Penalty Assessment Regulations (former 30 C.F.R. Part 100) were consistent with the requirements of the Coal Mine Health and Safety Act. The opinion then went on to issue a ruling which struck down, and properly so, the part of the regulations which permitted a proposed civil penalty assessment order to become final without accompanying findings of fact, even though such findings are expressly required by Section 109 of the Coal Act.

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[3]The Petitioner acknowledges that, unlike the situation in the Third, Fourth, and Sixth Circuits, Coal Act civil penalties cannot be enforced in the District of Columbia (since no coal mines are located there); however, the Petitioner ignores the substantive import of this fact, namely, that there is no split between two Circuits in which civil penalties can be enforced.

Section 109 (a)(1), as pertinent here, enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of violation."

Section 109 (a)(3) of the Act provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

The final assessment orders before the Third Circuit Court made no mention of the six statutory criteria as set out in Section 109 (a)(1), but merely set forth the Secretary's finding that a violation "did, in fact, occur." And since such orders did not contain express findings of fact, they did not satisfy the requirements of Section 109 (a)(3); however as noted by the Court, the orders were in apparent conformity with the then

applicable regulations, inasmuch as a "formal adjudication" of the orders had not been requested. In this state of the record the Court stated:

> "There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested."

The Third Circuit Court of Appeals was called upon to construe the controlling provisions of Section 109 of the Coal Act. It found such provisions to be plain and unambiguous on the face of the statute and that the contrary regulations must give way to the terms of the statute. That decision was and is correct and it should be allowed to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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